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HAMZAH OSMAN v. PP

FEDERAL COURT, PUTRAJAYA
HASAN LAH FCJ
ZAINUN ALI FCJ
RAMLY ALI FCJ
B PRASAD SANDOSHAM ABRAHAM FCJ
JEFFREY TAN FCJ
[CRIMINAL APPEAL NO: 05-68-03-2016(A)]
18 JULY 2017

C ***CRIMINAL PROCEDURE:*** *Trial – Fitness to stand trial – Whether accused fit to stand trial – Absence of certificate by Medical Director – Whether issue of soundness of mind of accused to plead resolved – Whether s. 343(1) of Criminal Procedure Code ('CPC') complied with – Whether trial rendered a nullity – Whether non-compliance of ss. 342(1) and 343 of CPC a mere irregularity*

D The appellant was charged at the High Court under s. 302 of the Penal Code ('PC'). After the trial, he was convicted and sentenced to death. The Court of Appeal upheld the conviction and sentence of the High Court and hence, this appeal. The High Court, in the exercise of its powers under s. 342(1) of the PC, investigated the fact of the appellant's unsoundness of mind which E was raised by the counsel for the appellant. Thereafter, the appellant was ordered to be remanded for observation at Hospital Bahagia Ulu Kinta, Perak under s. 342(3) of the Criminal Procedure Code ('CPC'). Subsequently, the respondent informed the court that the medical reports had been received confirming that the appellant was fit to stand trial. However, the medical F reports were never tendered nor marked in the court as an exhibit. In this appeal, it was argued for the appellant that there had been non-compliance with s. 343(1) and (3) of the CPC wherein, there was an absence of a certificate by the Medical Director, and that the respondent relied on an oral assertion in the court that the appellant was of sound mind and capable of G making his defence based on the medical report that the respondent had sight of. Thus, the bane of the appeal by the appellant was that the non-compliance with the aforesaid sections of the CPC rendered the proceedings a nullity.

Held (allowing appeal; matter ordered to be remitted back to High Court for retrial)

H **Per Prasad Sandosham Abraham FCJ delivering the judgment of the court:**

(1) Sections 342 and 343 of the CPC are concerned with the mental state of mind of the appellant at the time of the plea. The sections afford protection to an accused who is suspected of being of unsound mind and would be incapable of understanding the nature of the charges against I him and the meaning and import of evidence adduced against him. The '*raison d'etre*' of these sections is that the mental state of the accused

renders him incapable of making his defence thereby reducing his presence at the proceedings to a nullity. The sections do not apply to a situation where the accused is going to rely on a plea of insanity as a defence at the time of the commission of the offence. The appellant herein had never pleaded insanity. (para 8)

(2) The basis for the finding of the soundness or otherwise of the appellant to plead must be the certificate to state whether the appellant was fit to stand trial. There was no certificate of the Medical Director forthcoming nor was the same produced and/or tendered in court, apart from an oral assertion by the respondent. In the circumstances, the soundness or otherwise of the appellant to plead remained unresolved. Since there was non-compliance of s. 343(1) of the CPC after a reference was made by the High Court under s. 342(1) of the CPC, proceeding with the trial rendered the trial a nullity. (para 9)

(3) The statutory injunctions in ss. 342(1) and 343 of the CPC are sacrosanct to the fundamental right of the appellant in the criminal justice system to avail himself of the right to ensure that he is, in law, fit to plead and understand the consequence of proceedings against him. These are mandatory provisions and non-compliance of the same would render a trial a nullity. (para 10)

(4) Whilst it might be argued that non-compliance of ss. 342(1) and 343 of the CPC are a mere irregularity curable under s. 422 of the CPC bearing in mind, the appellant had been convicted under s. 302 of the PC and the agony the family of the deceased would have to go through in the event of a retrial and the laborious process of a retrial and its practical difficulties. However, it has to be taken into account that the concept of fitness to plead as enshrined in ss. 342 and 343 of the CPC is a basic fundamental right of the accused and breach of the same cannot be whittled down by deeming such breaches as directory in nature rather than mandatory. (para 14)

Bahasa Malaysia *Headnotes*

Perayu dipertuduh di Mahkamah Tinggi bawah s. 302 Kanun Keseksaan ('Kanun'). Selepas perbicaraan, dia disabitkan dan dijatuhkan hukuman mati. Mahkamah Rayuan mengekalkan sabitan dan hukuman Mahkamah Tinggi dan dengan itu, rayuan ini. Mahkamah Tinggi, dalam melaksanakan kuasanya bawah s. 342 Kanun, menyiasat fakta berkaitan ketaksempurnaan akal perayu yang dibangkitkan oleh peguam perayu. Kemudian, perayu diperintahkan untuk ditahan bagi pemerhatian di Hospital Bahagia Ulu Kinta, Perak bawah s. 342(3) Kanun Tatacara Jenayah ('KTJ'). Selepas itu, perayu memaklumkan kepada mahkamah bahawa laporan perubatan telah diterima yang mengesahkan perayu layak dibicarakan. Walau bagaimanapun,

laporan perubatan tersebut tidak dikemukakan atau ditandakan di mahkamah sebagai ekshibit. Dalam rayuan ini, dihujahkan bagi pihak perayu bahawa terdapat ketidakpatuhan s. 343(1) dan (3) KTJ kerana tiada sijil daripada Pengarah Perubatan, dan bahawa responden bergantung pada pernyataan lisan di mahkamah bahawa perayu sempurna akalnya dan boleh membela diri berdasarkan laporan perubatan yang pernah dilihat oleh responden. Oleh itu, asas rayuan oleh perayu adalah ketidakpatuhan seksyen-seksyen KTJ di atas yang mengakibatkan prosiding tersebut terbatal.

Diputuskan (membenarkan rayuan; memerintahkan kes dikembalikan ke Mahkamah Tinggi untuk perbicaraan semula)

Oleh Prasad Sandosham Abraham HMP menyampaikan penghakiman mahkamah:

(1) Seksyen 342 dan 343 KTJ berkait dengan keadaan akal perayu semasa pli dibuat. Seksyen tersebut memberi perlindungan kepada tertuduh yang disyaki tak sempurna akal dan tidak berupaya memahami sifat pertuduhan terhadapnya dan maksud dan kepentingan keterangan yang dikemukakan menentangnya. Sebab utama seksyen ini adalah keadaan mental tertuduh yang mengakibatkannya tidak berupaya membela diri dengan itu menyebabkan kehadirannya dalam prosiding sebagai batal. Seksyen-seksyen ini tidak terpakai pada situasi jika tertuduh akan bersandar pada pli tak siuman sebagai pembelaan pada masa kesalahan dilakukan. Perayu di sini tidak memasukkan pli tak siuman.

(2) Asas bagi dapatan ketaksempurnaan akal perayu untuk memplid atau sebaliknya adalah sijil untuk menyatakan sama ada perayu layak dibicarakan. Tiada sijil daripada Pengarah Perubatan dikemukakan dan ini juga tidak dikemukakan di mahkamah, kecuali pernyataan lisan oleh responden. Dalam keadaan tersebut, kesempurnaan akal perayu untuk memplid atau sebaliknya kekal tidak diputuskan. Oleh sebab s. 343(1) KTJ tidak dipatuhi selepas rujukan dibuat oleh Mahkamah Tinggi bawah s. 342(1) KTJ, meneruskan dengan perbicaraan menjadikan perbicaraan itu batal.

(3) Injunksi statutori dalam ss. 342(1) dan 343 KTJ amat penting buat hak asasi perayu dalam sistem keadilan jenayah untuk memberikan kepadanya hak memastikan bahawa dia, dari segi undang-undang, layak untuk memplid dan memahami akibat prosiding terhadapnya. Peruntukan-peruntukan ini mandatori dan ketidakpatuhan padanya akan menyebabkan perbicaraan tersebut terbatal.

(4) Walaupun boleh dihujahkan bahawa ketidakpatuhan ss. 342(1) dan 343 KTJ adalah ketidakaturan semata-mata yang boleh dibetulkan bawah s. 422 KTJ, mempertimbangkan bahawa perayu telah disabitkan bawah s. 302 Kanun dan keseksaan yang akan dialami oleh keluarga si mati dan proses memerihkan jika dibicarakan semula dan kesukaran secara

praktikal, perlu diambil kira bahawa konsep kelayakan untuk memplid seperti yang termaktub dalam s. 342 dan 343 KTJ adalah hak asasi tertuduh dan pelanggarannya tidak boleh dianggap remeh dengan menganggap pelanggaran itu bersifat panduan dan bukan mandatori.

Case(s) referred to:
Muthurama Kesavarajah v. The Queen [1994] 4 CLJ 464 HC ***(refd)***
PP v. Misbah Saat [1998] 1 CLJ 759 HC ***(refd)***
Wong Ban Chong v. PP [2015] 1 CLJ 640 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 342(1), (3), 343(1), 422
Penal Code, s. 302

Other source(s) referred to:
Prof Molly Cheang, *Fitness to Plead in Singapore & Malaysia and the Rationale, Anglo American Law Review,* p 209

For the appellant - M Manoharan; M/s M Manoharan & Co
For the respondent - Tetralina Ahmed Fauzi; DPP

[Editor's note: Appeal from Court of Appeal; Criminal Appeal No: A-05-339-11-2015 (remitted).]

Reported by S Barathi

JUDGMENT

Prasad Sandosham Abraham FCJ:

[1] The appellant was charged in the High Court under s. 302 of the Penal Code and after trial, was convicted and sentenced to death (see p. 6 AR Vol 2, the order of the High Court). The Court of Appeal upheld the conviction and sentence of the High Court (See pp. 5-6 AR Vol 1, the order of the Court of Appeal). The appellant's appeal to this court was heard and disposed of on 23 March 2017 wherein we allowed the appeal and remitted the matter to the High Court to be retried.

[2] Our decision was grounded on the principal point raised by counsel for the appellant that there was non-compliance with the relevant provisions of ss. 342 and 343 of the Criminal Procedure Code (Act 593) (CPC). To fully understand the arguments raised in this appeal we now set out the notes of evidence of the relevant portion of the trial in the court below ie, pp. 175-178, pp. 1-5 RR:

22.6.2011

TPR Puan Siti Fatimah Talib bagi pihak Pendakwaan. Puan Manjeet Kaur bagi pihak OKT. OKT hadir. Kes untuk sebutan. Puan Manjeet pohon agar OKT dihantar untuk pemerhatian di Hospital Mental di bawah seksyen 342(1) KTJ kerana ibu kepada tertuduh memaklumkan bahawa tertuduh sering mendengar suara dan juga dimaklumkan bahawa tertuduh telah beberapa kali cuba membunuh diri dalam penjara dan dikatakan

A mengalami tekanan jiwa tetapi tidak diberitahu samada keluarga OKT ada sakit mental. Mahkamah telah menjalankan ujian menyoal tertuduh dan Mahkamah mendapati OKT tidak bekerjasama dan enggan menjawab soalan-soalan yang ditanya oleh Mahkamah. Mahkamah ini ingin mendapatkan pengesahan daripada pihak penjara tentang perkara cuba membunuh diri dalam penjara oleh OKT dan juga maklumat daripada
B pihak ibu OKT. Mahkamah: Ke: 24.6.2011 (sebutan)

24.6.2011TPR Puan Siti Fatimah Talib bagi pihak Pendakwaan.Dato Naran Singh dan Puan Manjeet Kaur bagi pihak OKT. OKT hadir. Kes untuk sebutan.Permohonan oleh pihak Pembelaan di bawah seksyen 342(1) KTJ Dato Naran Singh memaklumkan latar belakang OKT. Puan
C TPR menjawabnya. Ibu kepada OKT turut hadir, memaklumkan mengenai OKT dan latar belakang ahli keluarganya.

Mahkamah: Permohonan peguambela dibenarkan. OKT dihantar ke Hospital Bahagia Ulu Kinta untuk pemerhatian selama 1 bulan dibawah seksyen 324(3) KTJ.

D Tarikh bicara: 27.6.2011 hingga 1.7.2011

4.7.2011 hingga 8.7.2011 dilapangkan.

22.7.2011 (sebutan) OTP dikeluarkan.

22.7.2011

E TPR Puan Noriah Osman menyebut bagi pihak TPR Puan Siti Fatimah Talib bagi pihak Pendakwaan.

Puan Manjeet Kaur bagi pihak OKT.

OKT belum dikemukakan.

F Kes ditangguhkan sebentar.

Kes dipanggil semula.

TPR Puan Noriah Osman bagi pihak TPR

Puan Manjeet Kaur bagi pihak OKT.

G OKT hadir.

Kes untuk sebutan.

TPR: Laporan Perubatan telah diterima dan mengesahkan OKT semasa kejadian beliau dalam keadaan waras dan buat masa ini keadaan mental beliau adalah stabil dan beliau
H layak untuk membela diri dan dibicarakan di Mahkamah.

Pertuduhan (P1) dibaca dan diterangkan kepada OKT dan jawab faham. Puan Manjeet pohon kes ini disebut pada 28.7.2011 di mana Dato Naran boleh hadir.

I Mahkamah: Ke 28.7.2011 (sebutan). OTP dikeluarkan.

[3] From the notes of evidence, it is clear that the High Court exercised its powers under s. 342(1), which we now set out: A

> Chapter XXXIII
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> PERSONS OF UNSOUND MIND
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> Procedure where accused is suspected to be of unsound mind 342. B
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> (1) When a Judge or a Magistrate holding a trial has reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence, he shall in the first instance investigate the fact of such unsoundness.

The High Court accordingly investigated the fact of such unsoundness of mind (see p. 176 notes of evidence). Thereafter the High Court ordered the appellant under s. 342(3) of the CPC to be remanded for observation at Hospital Bahagia Ulu Kinta, Perak. C

[4] Thereafter the respondent on 22 July 2011 informed the court that the medical reports had been received which confirmed that the appellant was fit to stand trial. Upon query from this court, the respondent's counsel confirmed that further the medical reports were never tendered, nor marked in court as an exhibit. D

[5] Counsel for the appellant argued before us, that there was been non-compliance with s. 343(1) & (3) of the CPC which we now set out ie: E

> Certificate of Medical Director
>
> (1) If the Medical Director shall certify that the accused person is of sound mind and capable of making his defence the Judge or Magistrate shall proceed with the trial. F
>
> (3) The certificate of the Medical Director shall be receivable as evidence under this section.

[6] In the instant case, it was not in dispute that there was an absence of a certificate by the medical director, and that the respondent relied on an oral assertion in court that the appellant was of sound mind and capable of making his defence based on the medical report the respondent had sight of. The bane of the appeal by the appellant is that non-compliance with the aforesaid sections of the CPC rendered the proceedings a nullity and a retrial of the same. G

[7] The respondent in their arguments attempted to persuade this court, that the said provisions were directory in effect and no prejudice had been occasioned to the appellant. We agreed with counsel for the appellant and ordered a retrial, setting aside the conviction and sentence and we append below our grounds for so doing. H I

A **Our Decision**

[8] It must be emphasised, that ss. 342 & 343 of the CPC is concerned with the mental state of mind of the appellant at the time of the plea. These aforesaid sections afford protection to an accused who is suspected of being of unsound mind and would be incapable of understanding the nature of the
B charges against him and the meaning and import of evidence adduced against him. The *"raison d'etre"* of these sections is that the mental state of the accused renders him in capable of making his defence thereby reducing his presence at the proceedings to a nullity. These sections do not apply to a situation where the accused is going to rely on a plea of insanity as a defence at the
C time of the commission of the offence. In our instant case a plea of insanity was never raised by the appellant. To encapsulate, we are dealing with the concept of fitness to plead, or fitness to stand trial, fitness to be tried and fitness to make defence which is the phraseology in ss. 342 and/or 343 of CPC, but which terms are used interchangeably. (See *Muthurama Kesavarajah*
D *v. The Queen* [1994] 4 CLJ 464; [1994] 181 CLR at p. 232 NB p. 234).

[9] On the evidence, it is clear the High Court, after having investigated the fact of unsoundness of the appellant, exercised its powers under 342(3) and remanded the appellant for observation at Hospital Bahagia Tanjong Rambutan. We note from the notes that no Certificate of the Medical
E Director was forth coming nor was the same produced and or tendered in court. Apart for an oral assertion by the respondent which tantamount to a statement from the BAR table at the highest, there was clearly non-compliance with s. 342(1) of the CPC. In our view, the soundness or otherwise of the appellant to plead remained unresolved as the basis for the
F finding must be the certificate to state whether the appellant was fit to stand trial, although the Medical Director needed not be present in court to tender the same his certificate would be admissible. Since there was non-compliance of s. 343(1) of the CPC after a reference was made by the High Court under s. 342(1) of the CPC, in our view proceeding with the trial as was done in
G this case by the High Court rendered the trial a nullity.

[10] The Court of Appeal in its grounds of judgment dealt with the issue at paras. 27-29 of their grounds appearing at pp. 30, 34 and 40 of the same. The essence of the approach of the Court of Appeal was as the trial had proceeded in earnest, the issue of fitness to plead had been overtaken by
H circumstances and at any rate no prejudice had befallen the appellant. This was echoed by the respondents in their submissions before this court. We would hold that the statutory injunctions in s. 342(1) & 343 of the CPC are sacrosanct to the fundamental right of the appellant in our Criminal Justice System to avail himself of the right to ensure that he is in law fit to plead
I and understand the consequence of proceedings against the appellant. These are mandatory provisions and non-compliance with the same would in our

view render a trial a nullity as in our instant case and under those circumstances the Court of Appeal misdirected itself in considering prejudice in this instant appeal where there had be non-compliance of the said section.

[11] We refer to an article written by Professor Molly Cheang published in Anglo American Law Review entitled *"Fitness to Plead in Singapore & Malaysia and the Rationale"* and which we agree with the author's views at p 209:

> The idea that persons of unsound mind should not be made to stand trial is one rooted in the age-old concept of fair play and fundamental justice. *This 'fitness' principle is both the product of the basic fundamental right of an accused to defend himself and a logical extension of the common law rule which prohibits trials in absentia. An accused suffering from mental disability is obviously unable to take the stress of a court appearance. It is also better for the dignity of the legal process that he should not be compelled to stand trial whilst labouring under such a condition. Indeed, if the accused is unable to comprehend the proceedings and to contribute to his own defence, it would be unjust to convict him because if he were capable of following the trial he might be able to exculpate himself. Moreover, mental disability may substantially diminish an accused's capacity to testify, to recall exonerating circumstances or identify witnesses and so forth*.

(emphasis added)

[12] This article was cited with approval by Visu Sinnadurai J in the case of *Public Prosecutor v. Misbah Saat* [1997] 3 MLJ 495 at p. 502 on the issue of fitness to plead, which we agree with the finding of the court in (2):

> (2) An accused person who has recovered from his unsoundness of mind, and who is fit to stand trial, may choose not to raise the defence of insanity. In such a situation, neither the prosecution nor the judge could raise the issue of insanity during trial if the accused has not raised the defence. The court's responsibility is only to ensure that the accused is fit to stand trial and a medical report would be relevant to assist the court in this finding. There is no need for the court to inquire into the issue as to whether the accused was insane in law at the time of commission of the offence. Therefore, the contention of the prosecution cannot be accepted (see pp 508A-B, 510I and 511A); *R v. Smith* [1979] 3 All ER 605, *R v. Dickie* [1984] 3 All ER 173 and *PR v. Zainal Abidin* [1993] 1 CLJ 147 followed; *PP v. Nageswari Nagaratnam* [1994] 3 MLJ 463 not followed.

(emphasis added)

[13] The Court of Appeal in *Wong Ban Chong v. PP* [2015] 1 CLJ 640 dealt with specifically with the interpretation of ss. 342 and 343 of the CPC and held:

> (1) *The JC should have waited for the psychiatrist report issued by the medical director to certify whether or not the accused was of sound mind and capable of making his defence before proceeding to trial. In the absence of the certification, it was wrong for the JC to proceed with the trial, let alone convict the appellant of the offences charged.* (para 7)

A (2) Making a finding as to the mental state of the accused is a mandatory requirement imposed on the trial judge or Magistrate under s. 343(2) of the CPC, failing which would render the trial a nullity and not a mere irregularity curable under s. 422 of the CPC. (para 13).

B (emphasis added)

We agree with the finding of the Court of Appeal in this regard.

[14] As a postscript, whilst it might be argued that non-compliance of these sections are a mere irregularity curable under s. 422 of the CPC bearing in mind, the appellant had been convicted under s. 302 of the Penal Code and
C the agony the family of the deceased would have to go through in the event of a retrial and the laborious process of a retrial and its practical difficulties, however the concept of fitness to plead as enshrined in s. 342 and s. 343 of the CPC is a basic fundamental right of the accused and breach of the same in our view cannot be whittled down by deeming such breaches as directory
D in nature rather than mandatory.

[15] We allowed the appeal and ordered the matter to be remitted back to the High Court for retrial. The appellant continued to be remanded.

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